IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 76-1310

THOMAS L. HOUCHINS,
Petitioner,

v.

KQED, INC., *et al.*,
Respondents.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL NEWSPAPER ASSOCIATION, THE ARIZONA NEWSPAPERS ASSOCIATION, THE PENNSYLVANIA NEWSPAPER PUBLISHERS ASSOCIATION, THE SOUTH DAKOTA PRESS ASSOCIATION

As *Amici Curiae* in Support of Respondents

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The National Newspaper Association – joined by the Arizona Newspapers Association, the Pennsylvania Newspaper Publishers Association and the South Dakota Press Association – respectfully submit this brief as *amici curiae* in support of Respondents KQED, Inc., *et al.*, and urge affirmance of the decision of the United States Court of Appeals for the Ninth Circuit, *KQED, Inc., et al. v. Houchins,* 546 F.2d 284, 2 Med.L.Rptr. 1115 (9th Cir. 1976).

Submitted with this brief, pursuant to Rule 42(2) of this Court, are the written consents of the parties for the filing of this brief.

INTEREST OF THE AMICI CURIAE

The National Newspaper Association (NNA) is a 93-year-old national association of more than 6,000 newspapers (950 dailies and 5,300 weeklies). NNA members include newspapers of general circulation in the Alameda County area. The named state press associations represent members who publish newspapers in their respective states.

NNA represents its members in national matters affecting business and professional aspects of newspaper publishing. The members range from small weekly newspapers to large metropolitan dailies, covering a wide philosophical and political spectrum. The great bulk of the membership consists of rural and suburban weeklies and small city dailies.

Member newspapers believe that they have a constitutional obligation to report on the functioning of local government and the stewardship of local public officials – especially as that stewardship concerns the condition and operation of publicly-financed institutions engaged in the involuntary incarceration of individuals. It is the view of these members that unreasonable restrictions on the ability to gather news about these institutions are abhorrent to the proper conduct of democratic government.

STATEMENT OF THE CASE

Amici curiae adopt Respondent's statement of the case. The chief facts are as follows: In March 1975, non-commercial television station KQED reported the suicide of a prisoner in Petitioner Sheriff's Alameda County Jail at Santa Rita, based on reports which the station was unable to verify fully. KQED also telecast statements by a jail psychiatrist that conditions at the facility were partly responsible for prisoners' emotional problems. A KQED reporter then

asked Petitioner for permission to see and photograph the jail. Jail officials denied the request and Petitioner cited his unwritten "policy" that the news media could not enter the jail. Another reporter was also unable to gain entry to cover stories of alleged gang rapes and poor conditions.

KQED brought suit in the United States District Court for the Northern District of California seeking injunctive relief to prevent the Petitioner from barring KQED reporters from the jail facility. The Court received affidavits and conducted an evidentiary hearing. The evidence showed that subsequent to the filing of the suit the Petitioner had inaugurated a series of public tours. Representatives of the press could attend a tour, but the evidence showed that each tour had a limit of 25 persons; that spaces were available on a first come, first served basis; that within one week of the announcement of the tours there were no spaces remaining for the six in 1975; that the tours did not include the Little Greystone barracks used to house pre-trial detainees; that the tours did not include the "disciplinary cells" in the Greystone facility;[1] that participants in the tours could not speak with any inmates encountered during the tours; that the participants could not take photographs; that the photographs offered for sale by the Petitioner did not fairly depict inmate life; that there was a ban on tape recorders; that the inmates were not generally visible to participants; that the tours were on a "schedule only" basis and never conducted at any time on request; and that in reality the participants never saw normal conditions at the jail.

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[1] Three years before the facts in this case arose, a United States District Court found conditions of confinement at Petitioner's Greystone facility to be "cruel and unusual." *Brenneman v. Madiagn*, 343 F.Supp. 128, 132-33 (N.D. Cal. 1972).

Petitioner presented "testimony illustrating in detail the route of the tour, and the interiors and exteriors of the buildings visited, including descriptions and photographs of the foregoing. Plans of the facility were admitted in evidence to illustrate the course of the tour . . ." Petitioner's Opening Brief at 8. The District Court concluded that the Petitioner's policy was inadequate.

The Ninth Circuit upheld the granting of a preliminary injunction requiring Petitioner to grant reasonable press access to the jail. The injunction was conditioned on the Sheriff's authority to restrict media access during circumstances at the jail which would make such access dangerous.

I. THE FIRST AND FOURTEENTH AMENDMENTS PROTECT THE RIGHT OF THE NEWS MEDIA, AS REPRESENTATIVES OF THE PUBLIC, TO OBSERVE FIRSTHAND AND REPORT ON THE CONDITIONS AT PRISONS AND OTHER PUBLIC INSTITUTIONS, ESPECIALLY THOSE WHERE THERE IS INVOLUNTARY INCARCERATION OF INDIVIDUALS.

Amici contend that the fundamental issue presented by this case is the right of the news media – and in turn the public – to see the conditions existing in institutions maintained by public authority. *Amici* submit that the contested "policy" of Petitioner Sheriff Houchins deprives the news media and the public of valuable information in violation of the First and Fourteenth Amendments to the Constitution of the United States.

The daily conduct of American government at the local, state and federal levels takes place largely within institutional environments. Inside the walls of these facilities government bears the responsibility for prisoners, medical patients, juveniles, the elderly and the infirm, and the poor. Yet, it is

the public which ultimately bears the responsibility for the condition and operation of these publicly-financed institutions.

Since private individuals cannot generally exercise this responsibility on their own, they necessarily depend on the news media for information:

> [I]n a society in which each individual has but limited resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975).

The news media must be able to enter and view public institutions if they are to fulfill their obligation to bring "an independent scrutiny to bear on the forces of power in society, including the conduct of official power at all levels of government." A Statement of Principles, American Society of Newspaper Editors, *The Bulletin*, Nov./Dec. 1975 at 23. News concerning public institutions is an essential part of our "profound national commitment" that the public requires a free flow of information on the conduct of government by public officials. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). After all, public officials administer these institutions and it is these officials who are ultimately responsible to the citizenry. Close scrutiny of public facilities therefore, is nothing more than evaluation of the stewardship of officials charged with vital public duties.

This Court has recognized that the First Amendment embodies protection for activities associated with newsgathering, that "news gathering is not without its First Amendment protections . . . ." *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972). For, "without some protection for seeking out

the news, freedom of the press could be eviscerated." *Id.* at 681. Ultimately, the failure to protect the right to gather news in public institutions could lead to the failure of the people to be able to make informed judgments about the conduct of their government.

Nowhere is it more important to provide the public with information about its institutions than in those situations involving involuntary incarceration. "[F]rom the standpoint of society's right to know what is happening within a penal institution, it is perfectly clear that traditional First Amendment interests are at stake." *Morales v. Schmidt*, 489 F.2d 1335, 1346 (7th Cir.) (Stevens, Circuit Judge, dissenting), *mod. en banc*, 494 F.2d 85 (1974). For only by obtaining information on these conditions may the public act to correct abuse or institute change.

> The conditions in public institutions such as Bridgewater for the care of the criminally insane, including the physical facilities . . . are matters which are of great interest to the public generally. Such public interest is both legitimate and healthy. Quite aside from the fact that substantial sums of taxpayers' money are spent annually on such institutions, there is the necessity for keeping the public informed as a means of developing responsible suggestions for improvement and of avoiding abuse of inmates who for the most part are unable intelligently to voice any effective suggestions or protests. *Cullen v. Grove Press, Inc.*, 276 F. Supp. 727, 728-29 (S.D. N.Y. 1967).

The secrecy which Petitioner apparently wishes to impose on the Santa Rita jail offends basic notions of the role of a free press in an open society. It is precisely in those situations where officials seek to deny access that the possibility of abusive conditions is the greatest.[2]

> It is important that conditions in public institutions should not be cloaked in secrecy, lest citizens may disclaim responsibility for the treatment that their representative government affords those in its care. *Wiseman et al., v. Massachusetts et al., pet. for cert. denied*, 398 U.S. 960, 962 (1970) (Harlan, J., dissenting).

II. PETITIONER'S UNWRITTEN POLICY AND MECHANISM FOR NEWS MEDIA ACCESS TO THE SANTA RITA JAIL VIOLATE THE MEDIA'S RIGHT TO GATHER AND DISSEMINATE NEWS AND THE PUBLIC'S RIGHT TO RECEIVE INFORMATION ABOUT THE CONDITIONS OF PUBLIC INSTITUTIONS.

Petitioner's unwritten "policy"[3] prohibits news media entry to the Santa Rita jail other than as a participant in a pre-scheduled tour – a tour the District Court found inadequate for newsgathering. The result of Petitioner's policy is that he is able to control completely what the public knows about his stewardship of the facility.

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[2] *Cf.* Amnesty International, *Report on Torture, World Survey of Torture* 109 (Duckworth & Co., London 1973).

[3] *Amici* allege that a serious question exists as to whether Petitioner may constitutionally restrict First Amendment rights without reducing his "policy" to writing. *See United States v. Abney*, 534 F.2d 984 (D.C. Cir. 1976) (Conviction for overnight sleeping in federal park, as part of protest, violates First Amendment where officials possess discretion to allow such sleeping but no written standards guide that discretion); *Nitzberg v. Parks*, 525 F.2d 378 (4th Cir. 1975) (Restrictions on freedom of expression of high school students by administrators may only be accomplished through precise written guidelines).

Petitioner attaches great significance to the availability of alternative sources of information instead of news media entry into the jail. This reliance is wrong for none of the alternatives allows news personnel to verify through first-hand accounts reports they might receive from an inmate's letter, for example. Indeed, this case began because of unverified reports of poor conditions in a portion of the facility still out-of-bounds to this date to public and press. Moreover, this Court itself has emphasized the importance of verification in news reporting. *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *see also, Phillips v. Evening Star Newspaper Co.*, 2 Med.L.Reptr. 2201, 105 Daily Wash. L.Reptr. 1425 (District of Columbia Superior Court 1977) (Newspaper liable for publication of false information received directly from police "hot line"). Simply stated in the context of this case, a reporter cannot be certain about the true facts existing in a prison by sitting on the doorstep. A reporter would be irresponsible if a story were approached in that way and it would be no less irresponsible for a reporter to rely totally on the Sheriff for a report on conditions or facilities at the jail.[4]

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[4] The following story vividly highlights the shortcomings of total reliance on prison personnel in reporting on penal institutions:

> In suburban Denver, the Sentinel weeklies ran a story written by Dick Sides about brutal jail treatment.
>
> "Prisoners were beaten, mutilated and raped in the Adams County Jail last spring and early summer," the feature began.
>
> Other inmates did the punishing, at least twice setting up kangaroo courts, declaring fellow inmates guilty of the crimes for which they were jailed, then savagely punishing them as sentences, Sides wrote.
>
> He based his article on a study conducted by probation officers and an interview with an undersheriff.
>
> (continued)

Amici view the access accorded the media by the public tours to be a patently unreasonable limitation on the media's right to gather news and the public's right to information about the jail. In the words of Judge Hufstedler:

> The media mission however, is different in degree, though not in kind, from the display to a tour group. The newsmen's function is to gather, to collate, and to transmit to a wide public audience all of the information which the public is entitled to know about prison conditions. A private tour group might have similar or better ability to gather information than newsmen, but it would be rare that the combination of training and the means of transmission enjoyed by the news media would be found in a tour group. An adequate view of prison conditions is unlikely if the observer is confined to the areas of prisons and the times of visitation that are appropriate for conducted tours. *KQED, Inc. v. Houchins*, 546 F.2d at 296 (Hufstedler, Circuit Judge, concurring).

Without the ability to employ photographic equipment, barred from important sections of the facility, and dependent upon the Sheriff to schedule a tour, it is obvious that the Sheriff's policy totally frustrates the media's access to the jail for the purpose of gathering and disseminating news.

It is for this reason that petitioner may not place reliance on *Pell v. Procunier*, 417 U.S. 817 (1974), or its companion

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[4] (Continued)

> The guards never discovered any of the reported incidents because prisoners acted as lookouts and "the code of the jail is 'Keep your mouth shut,'" said the county undersheriff.
>
> *Publishers' Auxiliary*, November 25, 1976, at 12.

case *Saxbe v. The Washington Post Co.*, 417 U.S. 843 (1974). Both *Pell* (California state prison system) and *Saxbe* (Federal Bureau of Prisons) approved flat bans on face-to-face interviews by the news media of inmates selected by the media. In ruling on claims of constitutional injury raised by the news media, the Court used language which suggested measurement of the media's right of access co-extensively with the public's. 417 U.S. at 834-35. However, in both *Pell* and *Saxbe*, "[e]xcept for the limitation . . . on face-to-face press-inmate interviews, members of the press are accorded substantial access to the federal prisons in order to observe and report the conditions they find there." *Saxbe* at 847. In *Saxbe*, members of the media could tour the federal prisons, photograph any prison facilities, interview inmates encountered on such inspections, and even interview randomly selected groups of inmates. *Id.* at 847-48. In *Pell*, California state prison regulations allowed reporters to visit maximum security sections of the institutions, to stop and speak with inmates, and to have access to "all parts of the institutions. . . ." *Pell* at 830.

It was these facts which compelled this Court to observe: "We note at the outset that this regulation [prohibiting face-to-face interviews upon request] is not part of an attempt by the State to conceal the conditions in its prisons or to frustrate the press' investigation and reporting of those conditions." *Pell* at 830. Similarly, in *Saxbe*, the Court found no "attempt by the Federal Bureau of Prisons to conceal from the public the conditions prevailing in federal prisons." *Saxbe* at 848. In the present case, a markedly different situation is apparent because Petitioner claims total authority to bar media access on any basis whatsoever. In fact, the result has been a near total restriction on the flow of news from the place where inmates are incarcerated. Thus, unlike the situation in *Pell* and *Saxbe*, the Court in this case is asked

by administrators to authorize a news blackout. Access to the prison as a place must therefore be measured by a different standard, and a different factual showing must be made, than access to individual inmates for the purpose of obtaining an interview.

The inevitable conclusion here is that Petitioner has frustrated media access to a public institution to such an extent as to cause serious First Amendment injury to the media and the public for whom they report.

III. LOCAL OFFICIALS MAY EMPLOY REASONABLE TIME, PLACE AND MANNER RESTRICTIONS BUT MAY NOT USE THESE RESTRICTIONS TO PREVENT NEWS MEDIA OBSERVATION AND REPORTING ON CIRCUMSTANCES AND CONDITIONS IN PUBLIC INSTITUTIONS ABOUT WHICH THE PUBLIC IS ENTITLED TO BE INFORMED.

Without doubt, a county ordinance prohibiting news media publication of any and all information concerning conditions at the Santa Rita jail would be unconstitutional. Just as surely, local regulations which operate to preclude effectively that reporting may not stand.

The fundamental flaw in Petitioner's unwritten policy is that it puts the burden on the news media to demonstrate reasons for admittance when as a matter of law the burden to justify exclusion must rest with the government. "The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms." *Estes v. Texas*, 381 U.S. 532, 615 (1965) (Stewart, J., dissenting).

The Petitioner has substantial discretion to impose conditions upon the entry of news media representatives to the

jail facility. But this authority to control the time, place and manner of access may never, as it has in the instant case frustrate meaningful access to news. *Amici* endorse the overall standard articulated by Judge Hufstedler in the decision below:

> [T]he public's right to knowledge about the conditions of prisons and prisoners is very extensive. Information should not be curtailed except to the extent reasonably necessary to shield the prisoners' small store of personal privacy, to protect the physical security of the prison, the prisoners, and the prison personnel, and to allow prison personnel enough privacy and administrative control to permit them effectively to perform their duties. As the eyes and ears of the public, newsmen are entitled to see and to hear everything within the institution about which the general public is entitled to be informed. 546 F.2d at 295-96.

Only upon a showing of actual danger to the security of the institution, or the safety of the inmates, may the Sheriff deny access to the press. Absent such a showing, the media must have access to the jail.

In order for the community press to fulfill its role as watchdog of local government, reporters and photographers must be able to enter prisons and other publicly-financed institutions, restricted only by rules honoring significant competing state interests and subject to reasonable time, place and manner regulations. A "no press access" or unreasonably "limited press access" policy is effectively a "no public access" rule. It is a rule which is unacceptable in our democratic system.

CONCLUSION

The freedom of the press to enter, and report on the operation of, publicly-financed institutions – and especially places where there is involuntary incarceration – is fundamental to our Constitutional scheme of government. The First Amendment recognizes that the press has a special role to perform as the public's representative in reviewing the operation of government institutions. Indeed, in this case, enhanced press access to the Santa Rita jail would provide the *governed* of Alameda County with the only reasonable means of exercising their democratic responsibility to know how their elected *government* carries out its duties. *Amici* urge this Court to affirm the decision of the Court of Appeals.

Respectfully submitted,

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